IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1986 OF 2005

(1)Ashish Mines & Minerals,]
a partnership firm, carrying on business at]
Rolex, S.V. Road, Malad (West),]
Mumbai 400 064]

(2)Vasant Nanji Gada]

(3)Kusumben Zaverchand Shah]

(4)Lilavati Nanji Shah]

(5)Zaverchand Jethalal Shah]

(6)Nanji Jethalal Shah]

All of Bombay, Indian Inhabitants, residing]
at Rolex, S.V. Road, Malad (West),]
Mumbai 400 064] ...Petitioners

Versus

(1)Central Bank of India]
a Body Corporate constituted under]
the Banking Companies Act (Acquisition and]
Transfer of Undertakings) Act V of 1970 having]
its Bombay Main Office at M.G. Road, Fort,]
Mumbai 400 023]

(2)Debts Recovery Appellate Tribunal,]
a Tribunal constituted under the Recovery of]
Debts due to Banks and Financial Institutions]
Act, 1993 having address at Scindia House,]

Ballard Pier, Mumbai]

(3)Debts Recovery Tribunal,]
a Tribunal constituted under the Recovery of]
Debts due to Banks and Financial Institutions]
Act, 1993 having address at Scindia House,]
Ballard Pier, Mumbai] ...Respondents

Mr. M.U. Pandey for the Petitioners

Mr. N.P. Shah instructed by M/s. Little & Co. for Respondent No. 1.

CORAM: **DALVEER BHANDARI, C.J., &**
S.J. VAZIFDAR, J.
DATE: AUGUST 12, 2005.

ORL JUDGMENT (Per Dalveer Bhandari, C.J.):-

1. The petitioners are aggrieved by the order passed in Misc. Application No. 489 of 2004 in Appeal No. 182 of 2004, by which the petitioners have been directed to deposit 50% of Rs.1,38,61,800.72 within eight weeks with the Registrar of the Debts Recovery Appellate Tribunal. It may be pertinent to mention that according to respondent No.1, the amount, which the bank has to recover from the petitioners as on 2nd December, 1991, is Rs. 1,82,22,363.39. The

brief facts which are relevant to recapitulate are as under:-

2. Respondent No. 1, Central Bank of India, on or about 25th May, 1985, agreed to grant and sanctioned to the petitioners credit facilities, *inter alia*, being the following:-

(a) Cash Credit-cum-Packing Credit Facility up to a limit of Rs.30,00,000/-;

(b) An Overdraft facility against receipted challans up to a limit of Rs.15,00,000/-; and

(c)A Term Loan of Rs.9,50,000/-.

3. The petitioners accepted and agreed to the terms and conditions of the grant of credit facilities. The petitioners executed the following documents:-

(a) A Promissory Note for Rs.30,00,000/- executed by the first petitioner, and also by petitioners No. 2, 3 and 4 in their personal capacity, bearing interest at the rate of 18% per

annum, with quarterly rests;

(b) A letter whereby the said Promissory Note was to operate as a continuing security for payment of the first respondent's dues, which letter was executed by the first petitioner and by petitioners No. 2, 3 and 4 in their personal capacity also;

(c) A letter agreeing to pay interest at such higher rate, as may be charged from time to time;

(d) A letter of partnership under which petitioners No. 2, 3 and 4 as partners undertook personal liability to pay the amount;

(e) A letter requesting that the account in respect of the said facility be opened in the name of the first petitioner;

(f) An Agreement of Hypothecation whereby the first petitioner duly hypothecated and/or charged in favour of the first respondent as and by way of first charge, as security for payment of the first respondent's dues under the said facility, all their tangible movable properties, such as products, stock-in-trade and goods, finished or raw or in the process of manufacture, and all the articles manufactured therefrom, including those mentioned in the schedule to the said Agreement. By the said agreement, the first respondent-bank was entitled to apply the said security and/or surplus available towards the satisfaction of its dues under any other facility or account whatsoever.

4. It may be pertinent to mention that from time to time, the first respondent-bank granted accordingly credit facilities to the petitioners. On 2nd March, 1988, the petitioners executed number of documents in favour of the first respondent-bank. The first respondent-bank also granted overdraft facility to the petitioners. The guarantees executed

by the petitioners on 2nd March, 1988 are continuing guarantees and are valid and subsisting. On 13th July, 1989, the petitioners executed number of documents in favour of the first respondent-bank.

5. It may also be pertinent to mention that in consideration of the bank's granting time for re-payment of the amount due under the aforesaid facilities and for further securing the said amount, the petitioners, on or about 13th July, 1989, deposited with the bank the title-deeds of the property situate at Kutch bearing Survey No. 368 of Village Vandh, Taluka Mandvi, as also of the factory building situated thereat admeasuring 4400 square metres.

6. Admittedly, the petitioners committed breach of the terms and conditions of the agreements on which the said facilities were granted, and failed and neglected to repay the said amount. The petitioners also failed and neglected to pay the instalments payable by them in respect of the term loan. Events of default, therefore, took place, entitling the first respondent to recall all the amounts advanced and outstandings under all the facilities. In any event, the advances were repayable on demand. Respondent No. 1-Bank, on several

occasions, called upon the petitioners to regularise their accounts under the said facilities and the term loan, since the said accounts had become irregular and also to remedy their breaches. The petitioners gave several assurances to regularise the accounts, but failed and neglected to do so. Ultimately, respondent No. 1 sent Advocate's Notice on 26th March, 1991 addressed to the petitioners and recorded some of the relevant facts and called upon them to pay respondent No.1' s outstanding dues and interest as mentioned therein. Respondent No. 1 also mentioned that in the event of payment not being made as demanded, respondent No. 1 would be constrained to adopt legal proceedings for recovery of its dues and for enforcement and realisation of all the securities created and subsisting in respondent No. 1's favour, including, in particular, the mortgaged securities. The petitioners replied by their letter dated 30th March, 1991 and requested for further facilities and did not dispute their liability, but failed to comply with any of the requisitions contained therein.

7. Respondent No. 1, in the suit, prayed as under:-

That it be declared that there is due and payable by the present petitioners jointly and severally to respondent No. 1 -

(i) under the Cash Credit-cum-Packing Credit facility a sum of Rs.1,28,91,855.55 as per Particulars of Claim, Exhibit 'L', with further interest thereon at the rate of 20.5% per annum with quarterly rests from the date of the filing of the suit till payment or realisation;

(ii) under the overdraft facility a sum of Rs.41,84,582.87 as per Particulars of Claim, Exhibit 'M', with further interest thereon at the rate of 21.5% per annum, with quarterly rests, from the date of the filing of the suit till payment or realisation, and

(iii) under the Term Loan, a sum of Rs.11,45,924.97 as per Particulars of Claim, Exhibit 'N' ,with further

interest thereon at the rate of 12.5% per annum, with quarterly rests, from the date of the filing of the suit till payment or realisation.

8. Respondent No. 1 also prayed -

(a) That the goods, book debts and machinery mentioned in the letters or Agreement of Hypothecation, including those in the Schedule (being Exhibit 'O') be sold and/or recovered and/or realised by and under the orders and directions of this Court and the net sale-proceeds and/or the net recovery and/or the net realisation thereof be paid over to the first respondent in or towards the satisfaction of its dues;

(b) That pending the hearing and final disposal of the suit, the Court Receiver, High Court, Bombay or some other fit and proper person be appointed Receiver of the mortgaged properties described in the Schedules being Exhibit 'I' and 'J', and the hypothecated goods, book debts and machinery

described in the said Letters and/or Agreements of Hypothecation, including those in the Schedule being Exhibit 'O' ,with all powers under Order XL, Rule 1 of the Code of Civil Procedure, 1908, including the power to sell and/or recover and/or realise the said goods, book debts and machinery and to pay over the net sale-proceeds and/or the net recoveries and/or the net realisation thereof to the first respondent towards its claims;

(c) That pending the hearing and final disposal of the suit, the present petitioners by themselves, their servants and agents or otherwise howsoever be restrained by an order and injunction of this Court from in any manner dealing with or disposing of or parting with possession of or alienating or encumbering or transferring or creating any right, title or interest in favour of any one else or inducting any one into or recovering or realising the said properties described in the Schedules (being Exhibits 'I' and ' 'J)or the goods and/or the book debts and/or the machinery described in the said

letters and/or Agreements of Hypothecation, including those in the schedule (being Exhibit 'O') or any part thereof.

9. The petitioners filed a Written Statement and thereafter, this Court appointed a Receiver with a direction to appoint petitioner No. 1 as his agent and fix royalty. Petitioner No. 1 deposited with the Court Receiver a sum of Rs.38,00,000/- as royalty, which has been paid over by the Receiver to the first respondent.

10. During the pendency of the said suit, the Debts Recovery Tribunal was established in Maharashtra under the Recovery of Debts due to the Banks and Financial Institutions Act, 1993 (hereinafter "the Act", for short). On the establishment of the Debts Recovery Tribunal in Mumbai, under Section 31 of the Act, the said suit was transferred to the Debts Recovery Tribunal from the stage at which the same was pending in this Court.

11. It may be pertinent to note that even according to the Debts Recovery Tribunal order dated 9th June, 2004, the petitioners were

directed to pay Rs.1,81,61,800.72 with future interest at 12% per annum.

12. On failure to repay the above-mentioned amount, the immovable property be sold and net sale-proceeds thereof be paid to the first respondent towards its claim.

13. The Tribunal further mentioned that the hypothecated goods and book debts be sold and net sale-proceeds thereof be paid to the first respondent towards its claim.

14. It is incorporated in the petition that on 1st March, 1999, one-time settlement was agreed upon between the parties, whereby the first respondent had agreed to accept from the petitioners a sum of Rs.92,00,000/- in addition to the sum of Rs. 38,00,000/- already deposited/paid through the Court Receiver of the Bombay High Court.

15. During the pendency of the said suit/O.A., in addition to the sum of Rs.38,00,000/- paid/deposited with the Court Receiver, the petitioners

paid an instalment of sum of Rs.23,00,000/- to the respondents as per the one-time settlement. Even according to the petitioners, in view of the one-time settlement, even after adjustment of Rs. 23,00,000/-, the petitioners were under an obligation to pay Rs.69,00,000/- and interest thereon from 1st March, 1999. The one-time settlement is of no consequence, because the petitioners failed to pay the remaining amount and obviously thereafter, the entire amount, as directed by the Debts Recovery Tribunal in the order dated 9th June, 2004, became due and payable.

16. The Debts Recovery Appellate Tribunal, in its order, mentioned that even from a cursory glance through the impugned judgment and order, it would be revealed that the petitioners do not appear to have any *prima facie* case in their favour. The proceedings reveal that the petitioners did not choose to appear in the Debts Recovery Tribunal, though they were duly served, and the petitioners were proceeded *ex parte* in the Original Application. There were documents executed by the petitioners, including deed of guarantee, memorandum of entry creating mortgage, statements of account, etc. Relying on these

documents and accepting them as proof in support of the claim, the original application of the bank came to be partly allowed by the Presiding Officer. The reason for partly allowing the claim was that a sum of Rs.16,613.46 was said to be charged under overdraft account, a sum of Rs.43,949.21 was said to be charged under term loan and a sum of Rs.60,562.67 was required to be deducted.

17. It was stated that a sum of Rs.23 lacs was paid by the petitioners but they failed and neglected to make the payment of balance amount under the compromise. Therefore, the bank was constrained to cancel the compromise offer. It was further stated by the counsel for the respondent-bank that the said amount was kept in “no lien” account.

18. The Appellate Tribunal further observed that no case for complete waiver is made out by the petitioners. Nothing is stated by the petitioners about their financial constraints, if any. No supporting documents are tendered to enable the Appellate Tribunal to have some idea with respect to the financial position of the petitioners.

Nothing is stated with respect to the business of the partnership firm, nor Income Tax returns of petitioners No. 2 to 6 are produced. Therefore, there is no reason as to why adverse inference against the petitioners should not be drawn.

19. On consideration of the totality of the facts and circumstances, deposit of 75% of the amount determined by the Tribunal under Section 19 of the Act is a rule and any deviation made therefrom is an exception. Taking an over all view of the matter, the Appellate Tribunal directed the petitioners to deposit 50% of Rs.1,38,61,800.72 within eight weeks with the Registrar of the Appellate Tribunal. The petitioners, being aggrieved by this order, have filed this petition.

20. The order of the Appellate Tribunal has been passed, perhaps, on the basis that in any event, even according to the petitioners, they are under an obligation to pay Rs. 69 lacs along with bank interest from 1st March, 1999, because according to the one-time settlement, the petitioners were obliged to pay Rs.92 lacs and out of that amount, they paid Rs.23 lacs, leaving the balance of Rs.69 lacs and interest

thereon. The petitioners challenged that order, *inter alia*, on the following grounds:-

(a) The order dated 9th June, 2004 passed by the Tribunal and the order dated 20th April, 2005 passed by the Appellate Tribunal are in total disregard and violation of the principles of natural justice and fair play and the said order dated 16th June, 2005 is passed by the Appellate Tribunal solely based upon the self-operative order dated 20th April, 2005, therefore, the same is also in violation of the principles of natural justice and fair play.

(b) It was the duty of the Tribunal and the respondents to serve upon the petitioners the compilation of the proceedings filed by the petitioners after transfer of the case from this Court to the Tribunal. The non-service of the compilation amounts to concealment of the proceedings before the Tribunal and is contrary to the rules framed under the Act for filing, processing and adjudication of the

proceedings before the Tribunal.

(c) The Tribunal and the respondents have failed in their statutory duty of serving the process of the Court / Tribunal upon the petitioners intimating to the petitioners the date of hearing of the proceedings before the Tribunal after the proceedings were transferred and numbered as O.A. No. 123 of 2004.

(d)The aims and objectives of the enactment of the Act are speedy recovery of the debts due to the banks and financial institutions but that do not authorise or empower either the banks or financial institutions or the Tribunal to by-pass or ignore the basic principles of natural justice and fair play. The Act makes provisions for the reasonable hearing being given to the borrowers / debtors but in the present case, the respondents have suppressed the process of the Court / Tribunal from the petitioners and the Tribunal has failed in its statutory duty of serving

notice of

hearing upon the petitioners and intimating the petitioners the date of hearing.

(e) The order dated 9th June, 2004 passed by the Tribunal is contrary to Section 19 read with Section 31 of the Act.

(f) The Recovery Certificate Order dated 9th June, 2004 is in total disregard of the process of the natural justice and fair play and totally contrary to the provisions of the Act and Rules framed thereunder.

(g) The learned Appellate Tribunal failed to take note of the fact that the order dated 9th June, 2004 was passed without offering opportunity to the petitioners of being heard in the matter. Therefore, it was void, *ab initio,* and/or vitiated by non-compliance of principles of natural justice and, therefore, it was a fit case for waiving statutory deposit required to be made as per the

provisions of Section 20 of the Act.

21. Since the petitioners made the grievance that they were not fully heard by the Tribunals, therefore, we decided to give full hearing to the petitioners. On careful scrutiny of all the statements made by the petitioners, we do not find any substance whatsoever. Even according to the one-time settlement between the parties, before the Debts Recovery Tribunal, the petitioners admittedly agreed to pay Rs.98 lacs on 1st March, 1999 as per the settlement. Out of that amount, admittedly, the petitioners only paid Rs. 23 lacs. A sum of Rs. 69 lacs plus bank interest as on date on that amount is due and payable, according to the petitioners, and the Debts Recovery Appellate Tribunal, in its order, has only directed the petitioners to pay 50% of Rs. 1,38,61,800.72, which does not become more than what the petitioners agreed to pay as one-time settlement as on date with interest. In this view of the matter, the impugned order passed by the Debts Recovery Appellate Tribunal is eminently just and fair and requires no interference by this Court.

22. Unfortunately, of late, it has become a tendency in commercial litigation to protract the matter as far as possible. File multiple appeals, revision, till the petition is finally heard and disposed of by the Hon'ble Apex Court. Quite often, even review petitions are filed against the judgment of the Hon'ble Apex Court, as a matter of course. This tendency, consequently, leads to wastage of otherwise very precious time of the Court and consequent delay in disposal of cases. This tendency has to be effectively curbed. The precious time of the Court can be utilised for other urgent matters awaiting adjudication.

23. This petition is totally devoid of any merit. In the facts and circumstances of the case, we are constrained to dismiss this petition with costs, which we quantify at Rs.10,000/- (Rupees ten thousand only). Since we did not call upon the first respondent to file reply-affidavit, we deem it appropriate to direct the petitioners to deposit the costs with the Maharashtra State Legal Services Authority, Mumbai, within four weeks.

CHIEF JUSTICE

S.J. VAZIFDAR, J.